

**House Ways and Means Trade Subcommittee Hearing  
On Advancing the U.S. Trade Agenda: The World Trade Organization**

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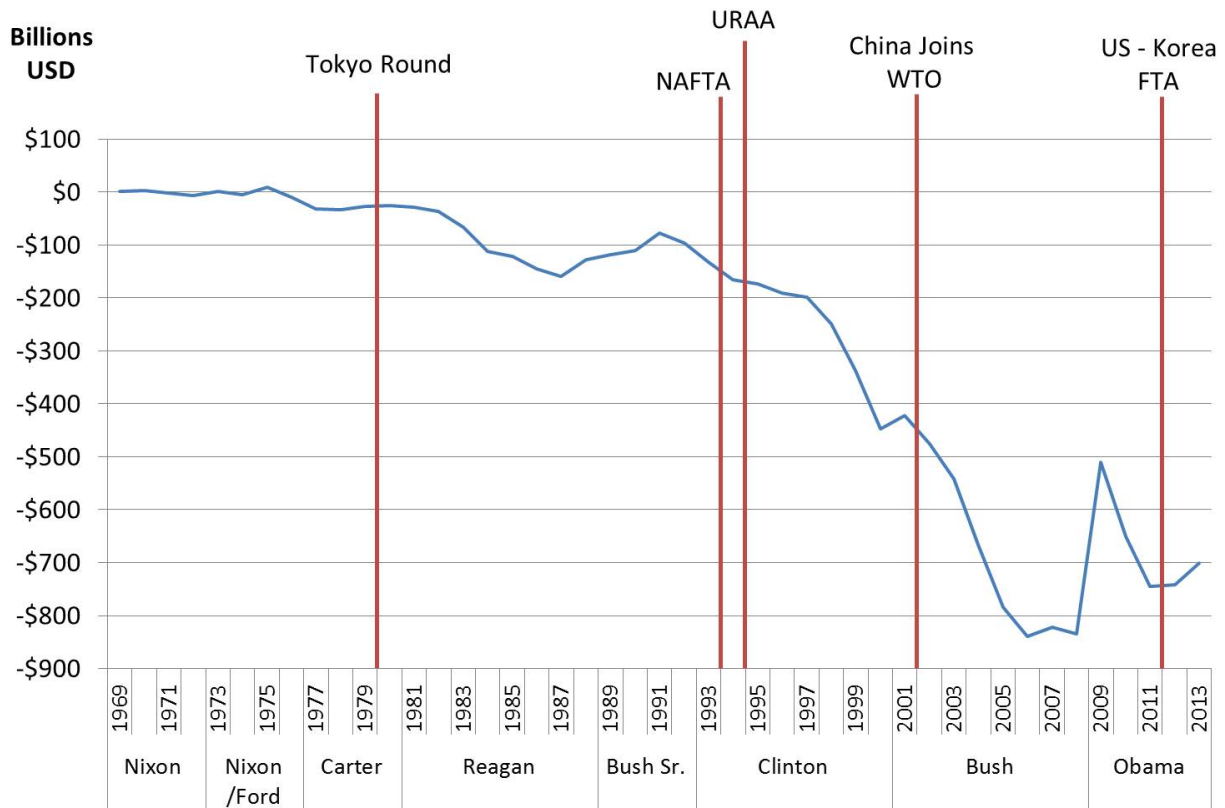
The Subcommittee's hearing on the World Trade Organization is timely with the recent launch of the environmental goods sectoral negotiations amongst fourteen WTO Members, the ongoing Trade in Services Agreement ("TISA") negotiations amongst the willing, the efforts to reach agreement on implementing the Trade Facilitation Agreement ("TFA") reached in Bali last December (end of July deadline), the efforts to get movement in the stalled expansion of the Information Technology Agreement ("ITA II"), and the agreement of the WTO Members to outline the path forward for the remaining elements of the Doha Development Agenda ("Doha Round") by the end of the year. The WTO also provides the basic standards for bilateral and plurilateral free trade agreements ("FTAs") or customs unions and so is relevant for the important plurilateral talks that the United States has ongoing in the Trans-Pacific Partnership ("TPP") and Transatlantic Trade and Investment Partnership ("T-TIP") negotiations.

These written comments are submitted on behalf of our firm and do not necessarily reflect the views of any of our current or past clients. I have followed developments in the WTO and the predecessor GATT for many years and have published extensively on all aspects of the organization and its various agreements. The comments hence reflect my perspective from observing the organization and various rounds of negotiations over the last thirty-five years.

**The United States will need to continue pursuing alternative approaches to trade liberalization**

The Doha Round, started at the end of 2001, has been largely stalemated for the last six years, movement to the Bali package being the sole beacon of hope in an organization where the change in economic power has not been accompanied by a comparable change in the level of responsibility for moving the organization forward. The United States has run a huge and largely growing trade deficit for most of the last forty years, as shown in the graph below.

## Yearly Balance of Trade by Administration (BOP Basis)



See “Will the United States Pursue Trade Agreements in 2014 to Address Our Huge and Persistent Trade Deficit,” Jan. 14, 2014, <http://www.stewartlaw.com/Article/ViewArticle/978>.

The United States, as part of the WTO Doha negotiations, has expected major beneficiaries of the system like China, Brazil, and India to carry a greater share of responsibility for global liberalization. Those countries have simply disagreed. The result has been an inability to achieve agreement on a road forward at the multilateral level.

As recent events in Geneva on the seemingly simply task of getting the TFA ready for implementation or the more than year delay in moving ITA II forward demonstrate, the major emerging economies are unlikely to accept a level of commitments consistent with their role in the global economy, reducing the likelihood that multilateral negotiations will result in market opening that meets U.S. needs or expectations. Despite the efforts of the United States and others in Bali to address India’s concerns on food security and the agreement to have the issue addressed in the coming years on a permanent basis, India has basically threatened to block consensus on adopting the TFA in recent weeks. See “TF Agreement Under Threat As July 31 Deadline Looms For WTO Amendment,” *Inside U.S. Trade*, July 11, 2014, at 27. Similarly, despite China being the largest trading nation in the world and a major beneficiary of the existing ITA, China has brought the ITA II negotiations to a standstill by limiting its willingness to accept a wide range of products of interest to the other ITA participants or demanding

unreasonable phase out periods for tariffs. While the recently concluded 6<sup>th</sup> U.S.-China Strategic and Economic Dialogue talks resulted in an apparent agreement for China to continue talking to the United States on ITA II, the problems flow from a different perspective on relative responsibility, calling into question even plurilateral talks where China, India, or Brazil are participants.

Thus, as important as the WTO is and should be, the United States will need to pursue not only multilateral but also plurilateral and bilateral approaches until there is agreement amongst the major trading nations on the relative level of responsibility and a common vision of the objectives and time horizons.

### **What areas are most likely to succeed in the short term?**

After Bali, one would have thought that the technical work to get the text of the TFA ready for signing and the work within individual countries and with the WTO to prepare lists of commitments would have been priority one and would have been doable. But there is now a cloud on whether the TFA will be implemented on time, will be implemented provisionally, or could be subject to changes. It may prove to simply be last minute posturing by some seeking advantages elsewhere. But the challenges in implementing an agreement that generally has been seen as a win-win for all parties demonstrate the paralysis that has afflicted the WTO in an increasing manner over the last nineteen and a half years. Even if implemented by the end of July, the value of the agreement to all Members will really depend on the ambition of the Members undertaking commitments and whether financing is in fact available for commitments dependent on donor funding. Thus, the benefits in the early years of implementation are likely to be relatively modest, with the broader benefits for the global economy not realized for a number of years.

While there are challenges in all negotiations, those among like-minded countries are likely to see the most progress in the shortest time periods:

- (1) The Information Technology Agreement is the most successful plurilateral in the history of the WTO, presently consisting of 78 WTO Members – up from 28 Members at the start in 1996 – including Russia, which joined on September 13, 2013, and covering 97% of trade in the global trade of the covered goods. Expansion of coverage of the ITA (the so called ITA II talks), which started several years ago, should be doable this year but only if China changes its position significantly on exclusions and phase out periods it is seeking. Considering the eighteen years of experience of the first ITA, it is a significant loss to global economic expansion that this agreement has not been possible. In 2011, the WTO put out a publication titled “15 Years of the Information Technology Agreement”. In its forward (page 3), then Director General Pascal Lamy wrote,

The 21st century is the era of information and communication technology, and the ITA has played a vital role in promoting affordable access to those technologies. This sector is crucial for the world economy – not only due to its considerable size, but also because it is an important driver of productivity, innovation

and, ultimately, economic growth. Over the past 15 years, world exports of IT products have almost tripled in value since 1996, and reached an estimated US\$ 1.4 trillion in 2010, accounting for 9.5 per cent of world merchandise trade. Together, ITA participants account for 96 per cent of world trade in IT products. And because they provide duty-free treatment to imports on a most-favoured-nation basis, they have created opportunities for exporters in all WTO members, including those in least-developed countries.

Because sectoral deals in goods are not doable under a free trade agreement approach, the challenge to concluding sectoral deals, like the ITA and the Environmental Goods Agreement (discussed below), is the need to get a critical mass, making inclusion of China often necessary as benefits cannot be limited to just the willing.

- (2) The largest part of global GDP around the world comes from services. During the Doha Round, service negotiations have largely been held hostage by developing countries interested in resolution of agriculture issues before permitting significant movement on services. The result has been the launch of negotiations by the willing of the TISA with the hope of a high level of ambition. A working paper from two members of the WTO's Economic Research and Statistics Division from late 2013 provides a good summary of the start of the talks:

The dynamism and importance of trade in services contrast sharply with the sluggishness of WTO negotiations in this area, where the latest serious attempt to move things forward dates back to mid-2008, on the occasion of the so-called services 'signalling conference'. Faced with that state of affairs, and against the background of a proliferation of preferential trade agreements (PTAs) covering services, a group of WTO Members, the so-called 'Really Good Friends of Services' (RGFs) agreed on 5 July 2012, to start preparing negotiations on an International Services Agreement to reinforce and strengthen the global services market. As of end October 2013, 23 WTO Members are participating in the discussions: Australia; Canada; Chile; Colombia; Costa Rica; the European Union; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; Mexico; New Zealand; Norway; Pakistan; Panama; Paraguay; Peru; Switzerland; Chinese Taipei; Turkey; and the United States. It has been reported that China and Uruguay have formally asked to join the negotiating group.

Juan A. Marchetti & Martin Roy, "The TISA Initiative: An Overview of Market Access Issues," at 3-4 (Nov. 27, 2013) (footnotes omitted).

Based on the challenges of ITA II and the general difficulties achieving consensus in the WTO on major areas where China is an active participant, the United States and other TISA members should be reluctant to accept China's or any other country's participation where a high level of ambition is not committed to in advance. As the House Ways and Means Trade Subcommittee is well aware, even advanced "commitments" to accept high levels of ambition can be quickly forgotten by countries joining plurilateral talks. Our problems with Japan in the TPP talks in both the agriculture and automotive sectors are a current reminder of that challenge. Advances in the TISA talks may progress best without further participants but with the opportunity to join at a later date after the current group of WTO Members completes negotiations.

- (3) The recently launched Environmental Goods Agreement, presently involving fourteen WTO Members – the United States, EU, China, Australia, Canada, Costa Rica, Chinese Taipei, Hong Kong, Japan, Korea, New Zealand, Norway, Switzerland, and Singapore – has the potential to be an important sectoral agreement but will likely suffer from the same problem that ITA II does – China is a participant and may not bring a similar level of ambition as other participants. Moreover, while there was agreement to use the APEC leader's list of 54 products as a starting point, we are likely to see significant delays in reaching agreement on the total package of goods and on how to ensure expansion of the product coverage over time. While it appears that Members may be willing to see issues on services and non-tariff barriers addressed in a phase two of the negotiations, there are a lot of complications if the negotiations address more than market access. Finally, the fourteen WTO Members account for 86% of the trade of the 54 product categories that are the starting point. Critical mass for sectorals has often been viewed as at least 90%, meaning additional Members to the talks may be viewed as essential before a final agreement is acceptable to the current fourteen.<sup>1</sup>

### **Other WTO negotiations and functions**

At Bali last December, Ministers agreed to various measures related to the Doha Round topics. Some were temporary. *See generally* 9th WTO Ministerial Conference, Bali, 2013, *Bali Ministerial Declaration and decisions*, [http://wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/balipackage\\_e.htm](http://wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm); "Saved at the Bell – The WTO Ministerial Provides Hope that Multilateralism Can Survive and Provides a Needed Boost to Global Economic Growth," Dec. 7, 2013, <http://www.stewartlaw.com/Article/ViewArticle/974>. They also agreed to develop a work program to bring the Doha Round to a close. In particular, paragraph 1.11 of the Bali Ministerial Declaration states:

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<sup>1</sup> For additional information see "Will New Environmental Goods Negotiations Increase U.S. Exports and Help Create a Greener Planet?," Feb. 3, 2014, <http://www.stewartlaw.com/Article/ViewArticle/982>; "Environmental Goods Trade Talks – The Challenges and the Opportunities," April 2, 2014, <http://www.stewartlaw.com/Article/ViewArticle/992>.

1.11 To further demonstrate this commitment, we instruct the Trade Negotiations Committee to prepare within the next 12 months a clearly defined work program on the remaining Doha Development Agenda issues. This will build on the decisions taken at this Ministerial Conference, particularly on agriculture, development and LDC issues, as well as all other issues under the Doha mandate that are central to concluding the Round. Issues in the Bali Package where legally binding outcomes could not be achieved will be prioritised. Work on issues in the package that have not been fully addressed at this Conference will resume in the relevant Committees or Negotiating Groups of the WTO.

World Trade Organization, Ministerial Declaration of 7 December 2013, WT/MIN(13)/DEC at 3.

While the United States and other WTO Members are engaged in the process of meetings within negotiating groups, the landscape is significantly blurred at present because of the problems with implementation of the TFA. As Deputy USTR Michael Punke noted at the June 25, 2014, Trade Negotiations Committee meeting in Geneva:

If the Trade Facilitation Agreement unravels, it's hard to imagine a post-Bali work plan proceeding. Why? Because Members of this organization will have demonstrated to the world that WTO negotiations, even when they are successful, are simply not taken seriously by all WTO Members. This would devastate our collective credibility to negotiate in areas that all of us know are far more difficult than trade facilitation.

Moreover, even if the TFA is successfully implemented on time, the major differences that exist in expected contributions by major WTO Members promise to leave the organization hamstrung in terms of its ability to actually find solutions in the remaining Doha areas of negotiation. Ambassador Punke noted some of the challenges in his statement at the Trade Negotiations Committee meeting on June 25. Imagine the largest trading nation in the system – China – arguing that thirteen years after becoming a Member of the WTO and after having become the largest trading nation, it needs special treatment as a recently acceding Member!

Thus, the likelihood of a successful path to concluding the Doha Round is not high, which is unfortunate both for the market access our producers will not achieve and because of the loss of the opportunity to address other challenges posed by the current structure and operation of the WTO – whether correcting periodic problems of serious WTO Appellate Body overreach<sup>2</sup> in the ongoing Dispute Settlement Understanding (“DSU”) negotiations or clarification of rights and obligations under the Antidumping Agreement and Subsidies and Countervailing Measures Agreement or new disciplines on fishery subsidies. Moreover, without clearing the agenda of the Doha Round, the WTO seems unable and/or unwilling to address evolving trading challenges.

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<sup>2</sup> See Terence P. Stewart et al., *The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard?*, 8 GLOBAL TRADE & CUSTOMS J. 390 (2013).

I am not arguing for a cessation of engagement at the WTO, just a caution that as we try to move the process forward within the WTO, we need to continue to explore avenues that can lead to advances even if less robust than might be possible within the multilateral context.

Sectorals can be successful if a critical mass of participation can be found (as measured by trade in the sectors), but typically will require participation by at least one or more of the major emerging economies. ITA is a successful model; the inability to move China has delayed progress in achieving ITA II. The Environmental Goods Agreement talks now underway is another promising area. Medical devices may be an area of interest as well, although there are many regulatory challenges U.S. medical device manufacturers face around the world. Historically, chemicals was an area of interest, but would presumably require China and India to participate to achieve critical mass, making further liberalization more likely to be tied to multilateral negotiations or to FTAs.

Plurilateral agreements that limit benefits to the participants can be structured in some areas (e.g., TISA) and offer the carrot of significant market access for participants with the opportunity for others to join when they are ready to seek the same level of ambition.

And, of course, FTAs with important trading partners willing to commit to a high level of ambition and that address all major concerns of U.S. constituencies and establish reciprocal access in fact can be important tools. With the lack of transparency in the current TPP and T-TIP negotiations, it is unknown whether the ongoing negotiations will achieve what the United States actually needs to achieve truly reciprocal market access. Obviously, hopes are high that we will achieve such success. Unfortunately, past FTAs have a mixed history of accomplishments in fact.

### **Other WTO functions**

The WTO has a number of important, if not high profile, functions in addition to housing negotiations. Every WTO Committee meets at least twice a year to review developments, to permit Members to raise questions and obtain answers and gain a better understanding of the trading system of trading partners. These Committees have been less active in recent years because of the energy put into the Doha Round. Nonetheless, the Committees can serve an important function in improving compliance with procedural requirements and the evaluation of steps trading partners may accept to clarify or address outstanding issues. There are few levers to actually force Members to comply with notification requirements, other than peer pressure and public disclosure. The United States has flagged the problems with inadequate notifications from China and India in areas like subsidies. While that puts pressure on the trading partner to comply with notification requirements, in fact it has made no difference as neither country has improved the quality of their notifications. Thus, as important as transparency is in the WTO Committee process, at the end of the day, a determined failure to comply by Members has proven elusive to resolve.

A second transparency aspect of the WTO is the Trade Policy Review Mechanism (“TPRM”), which requires Members to be reviewed periodically in terms of their trade policies. A great deal of information can be developed through the TPRM process. A challenge for the United States and other Members is the failure of some countries, China being the most recent example,

to provide complete information, hence making an understanding of their trading systems unclear or incomplete. The review process depends on good faith actions by each WTO Member. While the United States can raise concerns and provide counter-submissions of programs that should be reported, the array of views on obligations is problematic for the proper functioning of the WTO.

The most obvious major function of the WTO, which is receiving a lot of attention, is the dispute settlement system. The House Ways and Means Trade Subcommittee advisory notes that there have been some 500 cases and that the United States has brought about 100 cases. It is certainly the case that binding dispute settlement in the WTO is a major development within intergovernmental organizations and can be a positive force for U.S. businesses. But there have been widely noticed problems. At the time of the 2002 Trade Act to provide trade promotion authority, Congress mandated that the Administration identify how it would proceed to address a pattern of WTO Appellate Body overreaching – essentially a problem of the Appellate Body ignoring the limitations of the DSU and creating obligations on Members that were never agreed to. It has been particularly problematic in trade remedy situations, but goes beyond that. The problem flagged by Congress in 2002 continues to be of concern in a number of cases.

A fundamental problem with the WTO dispute settlement system is the lack of reasonable opportunity for the “legislative arm” (WTO Members acting in the General Council or through negotiations) to address perceived erroneous decisions of the Appellate Body. The negative consensus approach to dispute settlement basically ensures that the winning party cannot be deprived of implementation of a decision from the dispute settlement system. The general use of consensus for decision making ensures that erroneous decisions will not be modified without the consent of the victor. Thus, there is effectively no ability to clarify rights and obligations when a dispute settlement panel or the Appellate Body makes an erroneous decision. This is much different than what Members face within their national system. That courts will render an occasional decision that deviates from the legislature’s intent is well understood. For example, in the United States, a construction of the reach of U.S. countervailing duty law in 2012 by the U.S. Court of Appeals for the Federal Circuit led Congress to pass legislation clarifying the underlying statute. *See* Pub. L. No. 112-99, 126 Stat. 265 (2012) (codified as amended in 19 U.S.C. §§ 1671, 1677f-1).

While the United States has pushed for changes to the DSU as part of the ongoing Doha Round, it is important that Congress and the Administration continue to pursue modifications in the operation of the DSU so that all Members retain the rights not specifically limited by existing agreements. The following articles provide an overview of some of the more disturbing aspects of the Appellate Body overreach phenomenon: Terence P. Stewart et al., *The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard?*, 8 GLOBAL TRADE & CUSTOMS J. 390 (2013); Michel Cartland et al., *Is Something Going Wrong in the WTO Dispute Settlement?*, 46 J. WORLD TRADE 979 (2012).

### **Issues that need to be addressed to achieve true reciprocity**

In a write-up done back in January, I identified a number of the issues that have led to the structural imbalance in our trade relationships with other nations. Most of these need to be



addressed in the WTO, although some have proven intractable for as many as fifty years. The following excerpt lays out issues that we as a nation urgently need to address:

One can certainly identify a range of factors that have contributed to the loss of jobs and the swollen deficit.

1. Energy imports and the distortions in global markets caused by the oil cartel have been one example. Since energy imports constitute the largest single category in our trade deficit with the world, finding a multilateral solution to the cartel problem has been and continues to be an unresolved problem. Recent oil and gas production in the United States has bolstered domestic production and is reducing the import reliance for the first time in many decades (the deficit in petrochemical products is down \$53 billion in 2013 for the first 11 months. However, that deficit is still running at \$230 billion for 2013 for the year).
2. The inability of the political parties to resolve the large distortions caused by the differential treatment of direct and indirect subsidies under GATT and now WTO rules places U.S. manufacturers and agricultural producers at severe disadvantages because of export subsidies, which are not addressable within the United States on imported product, and a double taxation on U.S. exports when entering the some 160 countries with indirect tax systems (e.g., value added tax). It affects service providers as well. This is an example of an issue that Congress has understood and has included in every fast track/trade promotion bill since 1974 and that the Johnson Administration worked hard to get addressed in the 1960s. The peculiar discrimination against U.S. companies and their workers from the inability of the United States to get trading partners to address the issue or of Congress to agree on an approach that would convert our tax structure to one that more closely resembles many of our trading partners seriously handicaps U.S. companies and their workers.
3. Market access commitments made by trading partners at the WTO and/or in FTAs should have improved reciprocity for U.S. companies and workers. However, the inability to obtain compliance with existing obligations has been a perennial problem for U.S. exports.
  - a. For example, Japan's automobile market and barriers to participation in the motor vehicle and motor vehicle parts sector is as closed today in fact as it has been since the 1960s.
  - b. U.S. agriculture is blocked for many improper reasons around the world, whether in the EU, Asia, or elsewhere. China's continued refusal to open its market to U.S. beef is one classic example.
  - c. Many academics and sectors of the U.S. economy have been complaining for years about currency manipulation that distorts trade

by encouraging exports and limiting imports – Japan, Korea, and China have been frequently cited by the private sector as posing major concerns. For example, in a recent study, C. Fred Bergsten and Joseph Gagnon of the Institute for International Economics estimate that \$200-500 billion of the U.S. current account deficit is caused by currency manipulation, most of that by China.

- d. And the list of problems U.S. exporters and companies face with China not complying with its WTO commitments is stunning as the 2013 USTR report to Congress on China's WTO Compliance (159 pages) reveals. The role of state-owned and state-invested enterprises, the interference with investment decisions through the requirements of technology transfer and local content requirements, the use of WTO-illegal export restraints, the retaliatory use of trade remedies by China—the list goes on and on. While U.S. exports to China have grown, the ratio of U.S. imports from China versus U.S. exports to China remains at 4 to 1, with China accounting for a huge part of our overall trade deficit—43.3% in 2012 (U.S. International Trade Commission website, total exports – U.S. general imports) and 46.2% in 2013 (1st eleven months). **Every year that the United States is not able to get the benefit of the bargain from China's accession our deficit grows. We are now running an annual deficit with China of more than \$300 billion, meaning a loss of manufacturing jobs of more than 1.6 million.**

So the problems are many and the current approach of a slightly modified trade promotion bill, which at least attempts to begin to address some issues (currency manipulation and state-owned enterprises for example) and provide some better Congressional oversight, is likely not sufficient to change the trajectory of our trading relationship with the world. That suggests that the Congress and the Administration need to use 2014 to in fact ensure that the path forward is not simply a continuation of the path on which we have been. \* \* \* We cannot continue to run trade deficits of \$700-800 billion per year. Many of the issues that need to be addressed may be in the trade policy arena. Other issues that need to be addressed may be in the domestic policy arena to prevent the continued loss of jobs, businesses, and the tax base in communities across the country. But you cannot address the core problems if you are not open to an honest debate on what has and has not happened under the trade policy direction of the last four decades and what is actually needed to turn our trade policy into a reality of balanced opportunities for our companies and workers.

“Will the United States Pursue Trade Agreements in 2014 to Address Our Huge and Persistent Trade Deficit”, Jan. 14, 2014, <http://www.stewartlaw.com/Article/ViewArticle/978>.